Dato' Mahindar Singh s/o Harcharan Singh v Majlis Peguam

HIGH COURT (KUANTAN) — ORIGINATING SUMMONS NO 24-278-1994
ARIFIN ZAKARIA J
28 JANUARY 1995

Legal Profession *— Practice of law — Sijil annual — Rejection of application — Lawyer convicted of criminal offence — Conviction pending appeal — Requirements of s 32 of the Legal Profession Act 1976 fulfilled — Whether Bar Council had discretion to refuse application — Legal Profession Act 1976 ss 32 & 88A*

The plaintiff was a senior lawyer who had been convicted for a criminal offence. In October 1994, he made an application to the Bar Council for a sijil annual ('SA') for 1995, but his application was refused under s 88A of the Legal Profession Act 1976 ('the Act'). The Bar Council alleged that the issuance of the SA was not a rubber-stamping process, and in the exercise of its dicretionary power under s 32 of the Act, the Bar Council took the view that the plaintiff's conviction had rendered him unfit and improper to practise as an advocate and solicitor. In order to protect public interest and the interests of the legal profession, the Bar Council had decided not to issue the SA to the plaintiff. It was not disputed that the plaintiff had not disclosed his conviction in the application form for the SA ('the form') which was prescribed by the Advocates and Solicitors (Issue of Sijil Annual) Rules 1978 ('the Rules'). The plaintiff applied to the High Court for an order to direct the Bar Council to issue him with the SA on the grounds, inter alia, that: (i) it was mandatory for the Bar Council to issue him the SA, as he had already complied with all the requirements under s 32 of the Act; and (ii) there was no rule to say that upon a conviction which is pending appeal, the Bar Council could refuse to issue the SA under s 88A of the Act.

Held, allowing the application:

(1) The plaintiff's failure to disclose his conviction in the form could amount to non-compliance with the Rules and constitute sufficient grounds for the Bar Council to refuse the plaintiff's application under s 32. However, the form currently used by the Bar Council was different from the form prescribed in the Schedule to the Rules. The declaration that an applicant had not been convicted of a criminal offence did not appear in the prescribed form and an applicant could ignore any part of the form which in substance was different from the prescribed form. Therefore, the plaintiff's failure to declare his conviction could not be a valid premise for the Bar Council to reject the plaintiff's application.

(2) The plaintiff's conviction could well be within the term 'misconduct' within the meaning of s 94(2) of the Act, for which the disciplinary board had the power to strike off the roll or

suspend the plaintiff from practice. However, it was for the disciplinary board to decide whether to take disciplinary action against the plaintiff. By refusing to issue the SA to the plaintiff on the ground of his conviction for a criminal offence, the Bar Council had usurped the power which was expressly conferred upon the disciplinary board by the Act.

(3) Under s 88A, the power to suspend an advocate and solicitor lies with the Chief Judge on the application of the Bar Council. However, thus far, the Bar Council had not taken any step in making such an application. Therefore, it could not rely on s 88A to support its case.

Obiter:

If the Bar Council was desirous of inserting the declaration of non-conviction in the form, it should first amend the prescribed form and include therein the said declaration.

[Bahasa Malaysia summary

Plaintif merupakan seorang peguam yang sudah lama menjalankan amalan dan yang telah disabitkan atas kesalahan jenayah. Dalam bulan Oktober 1994, beliau telah membuat suatu permohonan kepada Majlis Peguam untuk sijil annualnya ('SA') bagi tahun 1995, tetapi permohonannya telah ditolak di bawah s 88A Akta Profesion Undang-Undang 1976 ('Akta itu'). Majlis Peguam mengatakan bahawa pengeluaran SA bukanlah suatu proses yang mekanikal dan dalam pelaksanaan kuasa budi bicaranya di bawah s 32 Akta itu, Majlis Peguam menganggap bahawa sabitan plaintif telah menjadikannya seorang yang tidak sesuai dan tidak layak untuk menjalankan amalan sebagai seorang peguam. Demi melindungi kepentingan awam dan profesion undang-undang, Majlis Peguam telah memutuskan supaya tidak mengeluarkan SA untuk plaintif. Adalah tidak dipertikaikan bahawa plaintif tidak mendedahkan sabitannya dalam borang permohonan untuk SA ('borang itu') yang telah ditetapkan oleh Kaedah-Kaedah Peguambela Dan Peguamcara (Pengeluaran Sijil Annual) 1978 ('Kaedah tersebut'). Plaintif telah memohon kepada Mahkamah Tinggi untuk suatu perintah mengarahkan Majlis Peguam untuk mengeluarkan SA kepadanya atas alasan, antara lain, bahawa: (i) adalah mandatori supaya Majlis Peguam mengeluarkan SA kepadanya, kerana beliau telah mematuhi kesemua keperluan di bawah s 32 Akta tersebut; dan (ii) tidak terdapat sebarang rukun yang menyatakan bahawa Majlis Peguam boleh menolak permohonan untuk SA di bawah s 88A Akta tersebut atas sebab sabitan di mana rayuan terhadapnya sedang dibuat.

Diputuskan, membenarkan permohonan itu:

(1) Kegagalan plaintif untuk mendedahkan sabitannya dalam borang itu boleh merupakan ketidakpatuhan dengan Kaedah tersebut, dan boleh merupakan alasan yang mencukupi untuk Majlis

Peguam menolak permohonan plaintif di bawah s 32. Walau bagaimanapun, borang yang digunakan sekarang oleh Majlis Peguam adalah berlainan dengan borang yang telah ditetapkan dalam Jadual kepada Kaedah tersebut. Deklarasi bahawa seseorang pemohon itu belum pernah disabitkan atas suatu kesalahan jenayah tidak muncul dalam borang yang ditetapkan dan pemohon boleh tidak menghiraukan sebarang bahagian borang yang kandungannya berlainan daripada borang yang telah ditetapkan. Oleh itu, kegagalan plaintif untuk membuat deklarasi berkenaan dengan sabitannya tidak boleh menjadi suatu alasan yang sah untuk Majlis Peguam menolak permohonan plaintif.

(2) Sabitan plaintif mungkin termasuk dalam terma 'salah laku' mengikut maksud s 94(2) Akta tersebut, yang mana lembaga tatatertib mempunyai kuasa untuk menyingkirkan nama dari senarai atau menggantungkan plaintif daripada menjalankan amalan. Walau bagaimanapun, adalah tugas lembaga tatatertib untuk memutuskan sama ada tindakan tatatertib harus diambil terhadap plaintif. Melalui keengganannya untuk mengeluarkan SA kepada plaintif kerana sabitan beliau atas kesalahan jenayah, Majlis Peguam telah merampas kuasa yang diberikan secara nyata kepada lembaga tatatertib oleh Akta itu.

(3) Mengikut s 88A Akta tersebut, kuasa untuk menggantung seorang peguambela dan peguamcara terletak pada Hakim Besar atas permohonan Majis Peguam. Walau bagaimanapun, setakat ini, Majlis Peguam belum lagi mengambil sebarang langkah untuk membuat permohonan sedemikian. Lantaran itu, Majlis Peguam tidak boleh bergantung kepada s 88A untuk menyokong hujah-hujahnya.

Obiter:

Jika Majlis Peguam ingin memasukkan deklarasi bahawa seseorang peguam itu tidak pernah disabit dalam borangnya, ia harus meminda borang yang ditetapkan itu dengan memasukkan deklarasi tersebut ke dalamnya terlebih dahulu.]

[*Editorial Note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No C–02–124–95.]

Notes

For cases on rejection of application of sijil annual by the Bar Council, see [1993] Mallal's Digest 1025.

Case referred to

Yip Shou Shan v Majlis Peguam [1994] 3 MLJ 82 (distd)

Legislation referred to

Abduction and Criminal Intimidation of Witnesses Act 1947 s 5
Legal Profession Act 1976 ss 29, 32, s 34, 88A, 93, 94(2), (3)

Advocates and Solicitors (Issue of Sijil Annual) Rules 1978 A
Solicitors' Account Rules 1978

Dato' Mahindar Singh (*Mahindar & Co*) for the plaintiff.
Hj Sulaiman bin Abdullah (*Zain & Co*) for the defendant.

Arifin Zakaria J: The plaintiff herein is a senior member of the Malaysian Bar practising under the name of Mahindar & Co. He was called to the Bar on 23 January 1963, and had since practised as an advocate and solicitor; all in all for a span of 23 years. B

As provided under s 29 of the Legal Profession Act 1976 ('the Act'), an advocate and solicitor practising in Malaysia is required to obtain in respect of each year a practising certificate. To obtain the said certificate, an advocate and solicitor is required to furnish to the registrar, inter alia, a sijil annual ('the SA') which is issued by the defendant under s 32 of the Act. By a letter dated 14 October 1994, the plaintiff applied to the defendant for the SA in respect of the year 1995. The defendant refused to issue the SA to the plaintiff. The reason for such refusal is disclosed in the defendant's letter dated 21 December 1994 ('exh H'). C D

On 14 November 1994, nine days after the 21-day deadline, as prescribed by s 32 of the Act, the plaintiff received a reply from the defendant. The relevant part of the said letter ('exh D') reads: E

> To enable the Council to consider your application, it will be appreciated if you could please let us know the present status of your appeal in respect of the conviction for incrimination (sic).

The plaintiff vide letter dated 1 December 1994, replied to the said query, giving details of the progress of his appeal against the order of conviction for an offence under s 5 of the Abduction and Criminal Intimidation of Witnesses Act 1947, the details of which do not concern me here. Suffice for me to say that, after several adjournments, the appeal was set down for hearing on the 12th of this month before the Temerloh High Court. I have been informed that the hearing did not go on as scheduled, and no new date has been given for the hearing of the said appeal. F G

Then on 21 December 1994, the plaintiff received another letter from the defendant as per exh H to the plaintiff's affidavit, the relevant part of which reads:

> With regard to the position of your sijil annual, the Bar Council has, at its meeting held on 17 December 1994, decided not to issue you with the sijil annual and to proceed under s 88A of the Legal Profession Act 1986 in view of your conviction for intimidation. H

The plaintiff vide letter of 22 December 1994 ('exh I'), expressed his objection to the steps taken by the defendant under s 88A of the Act, and maintained that a conviction for an offence for intimidation does not come under the purview of the said section. The plaintiff also requested for confirmation by the defendant that should such application be made, it would be made inter partes, so that he could appear and defend himself. He further gave notice to the defendant that he would be making an I

A application under s 34 of the Act. The defendant, in its letter of even date, stated that the plaintiff's request will be referred to its solicitor who will then keep the plaintiff informed of the development.

The plaintiff then filed this application on 28 December 1994, for an order that this court directs the defendant to issue the SA to the plaintiff.

B The grounds in support of the application are set out in the plaintiff's affidavit, which may be summarized as follows:

(i) as the plaintiff has complied with the requirements of s 32 of the Act, it is mandatory for the defendant to issue the SA to the plaintiff;

(ii) there is no bar to the issuance of the SA to the plaintiff, since there C is no rule to say that upon a conviction which is pending appeal, the defendant can refuse the SA or act under s 88A of the Act;

(iii) in view of the stay of execution order granted by the court in respect of his sentence, the rejection of his application for SA is a contempt of the stay order, is unjust in law and in equity;

D (iv) the defendant, having known the full facts of his criminal case and conviction had, since the said conviction until 1994, issued the SA to the plaintiff and by reason of the same, the defendant is now estopped from refusing to issue the SA to the plaintiff in law and in fact;

(v) the defendant had acted mala fide in delaying in replying to the E plaintiff's application; and

(vi) the defendant failed to observe the rule of natural justice by not giving the plaintiff the rights of hearing before the sijil annual sub-committee and the defendant, before they came to the sudden decision of refusing the SA to the plaintiff.

F I shall now deal with some of the grounds advanced by the plaintiff.

Section 32 of the Act

The relevant part of s 32 of the Act provides as follows:

Issue of sijil annual

G (1) Subject to this section and sections 33 and 34, the Bar Council shall at any time after the month of June in the preceding year issue a Sijil Annual to an advocate and solicitor within twenty-one days of the receipt of an application under subsection (2) if —

(a) the Bar Council is satisfied that the application complies with that H subsection and any rules made under this section;

(b) the Bar Council is satisfied that the applicant is not prohibited from holding a practising certificate under section 30;

(c) the advocate and solicitor has delivered or is exempted from delivering an accountant's report in accordance with section 79;

I (d) the advocate and solicitor is not in arrears in respect of any contribution to the Compensation Fund, or of any subscription or levy lawfully due to the Bar Council or his State Bar Committee under this Act; and

(e) the advocate and solicitor intends to practise under an approved name.

(2) An application by an advocate and solicitor for a Sijil Annual shall be made in such form or forms as may be prescribed by and in accordance with rules made under this section and shall be accompanied by appropriate certificates showing that subsection (1)(d) has been complied with.

The plaintiff's contention simply put is this: the plaintiff having complied with all the requirements of s 32 of the Act, it is then imperative upon the defendant to issue the SA to the plaintiff. The defendant, on the contrary, holds the view that under s 32 of the Act, it has a discretion whether to issue the SA or not. The defendant contended that the issuance of the SA is not a mere 'rubber-stamping process'. In the exercise of its discretionary power, the defendant, in the words of the counsel for the defendant, 'has to take into account public interest'. He contended that it is the duty of the defendant, as entrusted by the legislature, to protect public interest and the interest of the profession as a whole. Heavy reliance is placed on what was said by Eusoff Chin SCJ (as he then was) in the case of *Yip Shou Shan v Majlis Peguam* [1994] 3 MLJ 82 where at pp 87–88 he said:

> We are of the view that s 32 of the Act imposes a duty on the Bar Council to process and scrutinize every application for a sijil annual. It is the Bar Council's paramount duty to ensure that only an honest, trustworthy, fit and proper advocate and solicitor should be allowed to practise. ... it is, therefore, clearly misconceived to interpret the role of the Bar Council as merely a rubber-stamping process, it having no discretion to refuse to issue a sijil annual in circumstances where clearly it should not be issued in the public interest. To agree with appellant's argument would render s 34 otiose in its application to s 32, bearing in mind that s 32 is expressly subject to s 34.

The defendant's counsel in his submission further contended that since the plaintiff had been convicted of the offence of intimidation by a court of law, therefore, he is not a fit and proper person to continue to practise; and to allow persons like the plaintiff to continue to practise would be contrary to public interest and the interest of the profession. In view of all that the defendant's counsel said, the defendant decided not to issue the SA to the plaintiff. The question for the determination of this court is whether it is right in law for the defendant to do so in the circumstances of this case. The answer to this, I think, will depend on the proper construction to be given to s 32 of the Act. Counsel for the plaintiff claimed that there is no connection whatsoever between s 32 and the conviction suffered by the plaintiff. Therefore, on that ground alone, the decision in *Yip*'s case should be distinguished from this case. Let me pause here to consider what was the act or omission complaint of in *Yip*'s case. In that case, the appellant failed to submit to the Bar Council the accountant's report in accordance with the Solicitors' Account Rules 1978. In my opinion, that falls squarely within the purview of s 32(1)(c) and therefore, the refusal by the Bar Council to issue the SA to the appellant in that case was properly within the provisions of the said section.

In the present case, perhaps s 32(1)(a) may be relevant. The said paragraph stipulates that an application made under s 32(2) should, to the

satisfaction of the Bar Council, comply with that subsection and any rules made under s 32. The application form for the SA is prescribed by the Advocates and Solicitors (Issue of Sijil Annual) Rules 1978 (the rules made under s 32 of the Act). Therefore, it follows that any non-compliance with such form in whatever manner, may render an application to be defective and the defendant may, in such circumstances, reject such application. In fact, in para 11 of the affidavit of Catherine Eu, deposed on behalf of the defendant, it is stated that:

> This discretion was exercised in the plaintiff's favour despite his conviction. Disclosure of such convictions is now required pursuant to declaration (b) in the forms of application for sijil annual.

(The said 'declaration (b)' appears at the bottom of exh B1.)

It is not disputed that the plaintiff had not disclosed both his conviction and particulars of his conviction as required by the said form. Thus, it may be argued that such omission may amount to non-compliance with the rules made under s 32. That may constitute sufficient ground for the defendant to refuse the plaintiff's application. However, upon close scrutiny of the form (exh B1) (which is currently used by the defendant), I find that it is different both in form and content from the form as prescribed in the Schedule to the Advocates and Solicitors (Issue of Sijil Annual) Rules 1978. The new form has, inter alia, added in the 'declaration (b)' which states:

> And I hereby declare that I —
>
> ...
>
> (b) have not been convicted in Malaysia or elsewhere of a criminal offence which render me unfit to be a member of my profession, and in particular but not limited to an offence involving fraud or dishonesty.

Such a declaration does not appear in the prescribed form. In those circumstances, I am of the considered view that a member may choose to ignore any part of the form which in substance is different from the prescribed form. I, therefore, rule that the failure on the part of the plaintiff to state or declare his conviction as required by the so-called 'declaration (b)' could not be a valid premise for the defendant to reject the plaintiff's application. If the defendant is desirous of inserting the said 'declaration (b)' in the application form, what the defendant should do is to amend the prescribed form first, and include therein the said declaration. This has not been done. How could it then require its members to make the necessary declaration? I don't think it is a proper thing to do.

With regard to paras (b), (c), (d) and (e) of s 32(1), suffice for me to say that no suggestion was made by the defendant either through the affidavit in reply of Catherine Eu or in the submission of counsel for the defendant that the plaintiff has failed to comply with any of those provisions. In the circumstances, I may safely conclude that the plaintiff has duly complied with those provisions.

Further, I need to add that the disciplinary powers in relation to an advocate and solicitor now lie with the disciplinary board established under s 93 of the Act. Section 94(2) of the Act gives the said board the

power to strike off the roll or suspend from practice any advocate and solicitor who had been found guilty of misconduct. The term 'misconduct' includes a conviction for a criminal offence which makes him unfit to be a member of his profession (see s 94(3)). The plaintiff's conviction may well be within the term 'misconduct', hence, I think, it is for the board to determine whether to take disciplinary action against the plaintiff or not. In my view, refusing to issue the SA to the plaintiff on the ground of his conviction for a criminal offence, would be tantamount to the defendant usurping the power which is expressly conferred upon the board by the Act.

Section 88A of the Act

The defendant, through the affidavit of Catherine Eu, also referred to s 88A in support of its action. Paragraph 22 of the said affidavit reads, 'I have been advised by the solicitors of the defendant and verily believe that s 88A(1)(e) is applicable to the present case ...'.

Section 88A(1)(e) provides as follows:

> Suspension of advocate and solicitor
>
> (1) Where an advocate and solicitor —
>
> ...
>
> (e) is otherwise incapable, from infirmity of body or mind or any other cause, of effectively performing the functions of an advocate and solicitor;
>
> and the Bar Council considers that it would be in the public interest or in the interest of his clients or of the profession that such an advocate and solicitor be suspended from practice, the Bar Council may apply by summons to the Chief Judge ex parte for an order suspending such advocate and solicitor from practice until further order.

From the above provisions, it is clear that the power to suspend an advocate and solicitor lies with the Chief Judge on the application of the defendant. So far, the defendant has not taken any step in making such an application. Therefore, how could the defendant now claim that it is relying on s 88A to support its case. I find no merit whatsoever in such claim by the defendant.

Conclusion

In view of what I have said above, I think it is not necessary for me to go into other issues raised by the plaintiff in support of his application. For the above reasons, I allow the application by the plaintiff and accordingly, direct that the defendant do issue to the plaintiff the SA as applied for. On the question of costs, I order that the defendant pays the plaintiff's costs.

Application allowed.

Reported by Isabel Liong